UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

Civil Docket No. 3:12-cv-00456-MOC-DSC
(Consolidated with No. 3:12-cv-00474 and No. 3:12-cv-00624)

MAURINE NIEMAN, Plaintiffs, vs. DUKE ENERGY CORPORATION, et al., Defendants.	)))))))))))	CLASS ACTION JOINT DECLARATION OF ELI R. GREENSTEIN AND TOR GRONBORG IN SUPPORT OF (A) LEAD PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND APPROVAL OF PLAN OF ALLOCATION AND (B) LEAD COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES

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We, Eli R. Greenstein and Tor Gronborg, declare as follows:

1. We are partners of the law firms of Kessler Topaz Meltzer & Check, LLP ("Kessler Topaz") and Robbins Geller Rudman & Dowd LLP ("Robbins Geller"), respectively.[1] Kessler Topaz and Robbins Geller (together, "Lead Counsel") represent the Court-appointed Lead Plaintiffs and proposed Settlement Class Representatives—Amalgamated Bank, as Trustee for the LongView LargeCap 500 Index Fund and LongView LargeCap 500 Index VEBA Fund, Gerald Friesen, Carolyn Friesen and Craig Bacino, individually and as Trustee for the Janice and Craig Bacino Trust—in the above-captioned securities class action (the "Action"). We respectfully submit this joint declaration in support of: (i) Lead Plaintiffs' request for final approval of the proposed Settlement of the Action on the terms and conditions set forth in the Stipulation; (ii) Lead Plaintiffs' request for approval of the plan for allocating the net settlement proceeds to the Settlement Class; and (iii) Lead Counsel's application for an award of attorneys' fees and expenses. We have actively supervised and participated in the investigation, prosecution and resolution of this Action and have personal knowledge of all material matters related to the Action. We have also been kept informed of developments in the Action by other attorneys working with us and under our direction. The statements in this joint declaration are made based upon our personal knowledge unless otherwise indicated.

2. The Settlement provides for $146,250,000 in cash (the "Settlement Amount") to be paid by or on behalf of the Settling Defendants.[2] Pursuant to the Stipulation, the Settlement

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[1] Unless otherwise defined herein, capitalized terms shall have the meanings ascribed to them in the Stipulation of Settlement dated as of March 5, 2015 (the "Stipulation"). ECF No. 92.

[2] The "Settling Defendants" or "Defendants" are (i) Duke Energy Corporation ("Duke" or the "Company"); (ii) James E. Rogers, Duke's Chief Executive Officer ("CEO") and President during the relevant time period; (iii) Ann Maynard Gray, Duke's Lead Director and Chair of Duke's Corporate Governance Committee during the relevant time period; (iv) Lynn J. Good, the Group Executive and Chief Financial Officer of Duke when the Merger Registration Statement

Amount was deposited into an escrow account for the benefit of the Settlement Class by April 22, 2015. The Stipulation sets forth the terms of the Settlement, which, if approved, will resolve this Action entirely on behalf of Lead Plaintiffs and the Settlement Class.[3]

3. This joint declaration sets forth the nature of the claims asserted in the Action, which involve alleged misrepresentations and omissions concerning the Settling Defendants' conduct regarding the termination of William D. Johnson ("Johnson") as CEO of Duke after it merged with Progress in July 2012 (the "Merger"). It also details the proceedings to date, Lead Counsel's comprehensive factual investigation, the efforts undertaken by Lead Plaintiffs and Lead Counsel in prosecuting and resolving the Action, the substantial risks of continued litigation and the negotiations resulting in the Settlement. Lastly, it provides background facts supporting Lead Counsel's request for attorneys' fees and expenses, as well as the request for reimbursement pursuant to the Private Securities Litigation Reform Act of 1995 (the "PSLRA") for costs and expenses of Lead Plaintiff Amalgamated Bank.

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and Prospectus Materials were filed; (v) Steven K. Young, the Senior Vice President and Controller of Duke when the Merger Registration Statement and Prospectus Materials were filed; (vi) Marc E. Manly, Duke's Executive Vice President, Chief Legal Officer and Corporate Secretary at all relevant times; and (vii) the following directors of Duke during the relevant time period: William Barnet III; G. Alex Bernhardt, Sr.; Michael G. Browning; Daniel R. DiMicco; John H. Forsgren; James H. Hance, Jr.; E. James Reinsch; James T. Rhodes and Philip R. Sharp.

[3] For purposes of settlement and as agreed to by the Parties and ordered by the Court (ECF No. 93), the Settlement Class is defined as: All Persons who purchased or acquired shares of Duke common stock between June 11, 2012 and July 9, 2012, inclusive (the "Settlement Class"), including former Progress Energy Inc. ("Progress") shareholders who acquired shares of Duke common stock directly in the Merger of Duke and Progress. Excluded from the Settlement Class are the Settling Defendants, including all predecessors, successors, past, present or future parents, subsidiaries or affiliates of Duke and the families and affiliates of the Individual Defendants. Also excluded from the Settlement Class are all Persons who exclude themselves from the Settlement Class by timely and validly requesting exclusion in accordance with the requirements set forth in the Notice.

I. INTRODUCTION

4. This Action has been hard-fought from its commencement in July 2012 through settlement, which the Parties finalized in March 2015. As set forth herein, the Parties began exploring settlement only after Lead Plaintiffs and Lead Counsel had, *inter alia*: (i) conducted an extensive investigation into the Settlement Class's claims, which included the review and analysis of thousands of pages of documents and regulatory filings regarding Duke and Progress (*e.g.*, filings with the United States Securities and Exchange Commission ("SEC"), press releases, conference call transcripts, analysts reports, published interviews and the news media's extensive coverage of Duke, Progress and the Merger); (ii) engaged in intensive informal discovery by obtaining, reviewing and analyzing, among other materials, over 2,000 pages of testimony, hundreds of regulatory filings and over 5,000 pages of documents produced to several government agencies regarding the Merger, including internal Duke and Progress e-mails pertaining directly to the facts at issue in this Action; (iii) researched the complex legal challenges arising from the unique facts of this Action and developed the novel legal theories ultimately alleged in the pleadings; (iv) prepared and filed a detailed 338-paragraph consolidated complaint incorporating the fruits of their investigation and substantial legal research; (v) vigorously defended the Settlement Class's claims in the face of substantial legal and factual challenges raised by Defendants in their motion to dismiss and their objection to the Magistrate Judge's Recommendation denying the motion to dismiss; (vi) identified, retained and consulted with loss causation and damages experts; and (vii) prepared and began addressing with Defendants formal discovery requests regarding the claims and defenses in the case and the Merger itself. Lead Counsel's comprehensive investigation, research and briefing informed Lead Plaintiffs and Lead Counsel that, while the case against Defendants had merit, it also had

significant risks which had to be, and were, thoroughly evaluated in determining what course of action was in the best interests of the Settlement Class.

5. The negotiations leading to the Settlement were likewise hard-fought and required the Parties' careful analysis and presentation of complex factual and legal issues and consideration of the risks specific to the case. The Parties' negotiations were conducted with the assistance of the Honorable Layn R. Phillips (Ret.), a former federal district judge in the Western District of Oklahoma and an experienced and well-respected mediator, and included the preparation, submission and exchange of detailed mediation briefs, a formal in-person mediation session in May 2014 and months of additional telephonic discussions and negotiations. Following their agreement-in-principle to settle the Action, the Parties also spent several more months negotiating the specific terms of the Settlement and related exhibits.

6. The $146,250,000 Settlement currently before this Court for approval is an excellent result for the Settlement Class. Not only does the Settlement represent a substantial portion of the Settlement Class's potential recoverable damages,[4] but the Settlement also avoids the significant risk and expense of taking this Action to trial, including the risk of recovering less than the Settlement Amount, or no recovery at all, after substantial delay and expense. Moreover, if approved, the Settlement would represent one of the top five recoveries in a securities class action in the Fourth Circuit and the largest ever in North Carolina.[5]

7. Absent the Settlement, Lead Plaintiffs and Lead Counsel faced numerous legal and factual hurdles to proving Defendants' liability and establishing the Settlement Class's full amount of damages at trial. Indeed, at the time the Settlement was reached, Defendants' motion

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4 Lead Plaintiffs' damages expert estimates that the Settlement Class's likely recoverable aggregate damages are approximately $560 million. *See* ¶71 below.

5 *See* ISS Securities Class Action Services, LLC's *Top 100 1H for 2014* report at 4-7, available at www.issgovernance.com.

to dismiss was *sub judice* and there was a risk that the Court would decline, in whole or in part, to adopt Magistrate Judge Cayer's Recommendation and grant Defendants' motion. Surviving Defendants' motion to dismiss, however, would only be the beginning of what would surely be lengthy, contentious and expensive litigation. Indeed, given the novelty and complexity of certain of the legal issues in the case, there was a substantial risk of appeals at multiple stages of the litigation.

8. If the Action continued, for example, Defendants were certain to continue to challenge the timing of the "effective date" of the Merger Registration Statement for purposes of assessing the falsity and materiality of Defendants' statements and their disclosure obligations under the federal securities laws. If successful, Defendants' challenges on the "effective date" issue would have rendered Lead Plaintiffs' task in proving falsity under the Securities Act of 1933 ("Securities Act") increasingly more difficult. In addition, Defendants would continue to challenge Lead Plaintiffs' ability to prove the scienter element of their § 10(b) fraud claims under the Securities Exchange Act of 1934 ("Exchange Act"), maintaining that they did not act with the intent to deceive but rather, acted in good faith and in line with their fiduciary obligations to Duke shareholders and their contractual obligations under the Merger agreement. Lead Plaintiffs also faced several challenges in establishing that Defendants had a legal duty to disclose the facts and concerns underlying their eventual decision to remove Johnson as Duke's CEO. Given this highly fact intensive inquiry, Lead Plaintiffs faced the risk that, after full discovery, the Court or a jury could have concluded that Defendants' internal deliberations and concerns regarding Johnson were preliminary in nature and did not reach a level of materiality that required disclosure. Moreover, even if Lead Plaintiffs established Defendants' liability, Lead Counsel anticipated aggressive challenges to loss causation and damages. Defendants

indicated that they would argue, with the support of expert economists, that the declines in Duke's stock price between July 3, 2012 and July 9, 2012 were not caused by the disclosure of any fraudulent conduct, but rather the revelation of the news that Johnson would no longer be Duke's CEO. Defendants also would argue that any stock price decline after the initial July 3, 2012 news of Johnson's resignation could not be the result of any fraudulent conduct because the news regarding his termination was already known. This argument, if accepted by the Court or a jury, would have considerably reduced or eliminated altogether the recoverable damages in the Action. Defendants also would have likely asserted a proportional fault defense to reduce or eliminate the Settlement Class's § 10(b) damages entirely by arguing that certain of the defendants relied on others, including consultants and legal counsel, in opting not to disclose the internal facts about their decisions and deliberations regarding Johnson as CEO.

9. The numerous complex legal and factual issues in this Action would also require substantial expert discovery and testimony, and would add considerably to the expense and duration of the litigation. Particularly with regard to the elements of loss causation and damages, the trial would inevitably come down to a battle of the experts regarding complex economic and statistical analysis and all the uncertainties such a battle entails. All of these issues, and the risks attendant to them, were considered by Lead Plaintiffs and Lead Counsel in deciding to settle this Action on the agreed terms. On balance, considering all the circumstances and risks both sides faced were the parties to continue their march towards trial, both Lead Plaintiffs and Defendants concluded that settlement on the terms agreed upon was in the best interest of the Parties and the class.

10. At this time, Lead Plaintiffs also seek approval of the proposed plan for allocating the net settlement proceeds to eligible members of the Settlement Class (the "Plan of Allocation"

or "Plan") as fair and reasonable. In developing the Plan of Allocation, Lead Counsel consulted with their loss causation and damages experts and, in conjunction with those experts, developed economic event studies and statistical models to identify relevant movements in Duke's stock price and implanted trading models to calculate the number of damaged shares, all in an effort to appropriately allocate the proceeds among eligible members of the Settlement Class.

11. Additionally, Lead Counsel, on behalf of Plaintiffs' Counsel, are applying for an award of attorneys' fees and expenses (the "Fee and Expense Application"). Specifically, Lead Counsel are applying for attorneys' fees in the amount of 24.5% of the Settlement Amount. Lead Counsel are also applying for expenses in the amount of $191,738.27. The expenses incurred by Plaintiffs' Counsel over the duration of this Action—which covered, among other things, the detailed evidentiary investigation of the claims, legal research costs, the work of qualified experts, and expenses associated with mediation proceedings—were critical to Lead Counsel's success in achieving the proposed Settlement. In addition, Lead Plaintiff Amalgamated Bank—the type of large, sophisticated institutional investor favored by Congress when passing the PSLRA—is seeking reimbursement in the amount of $20,612.50 for its reasonable costs and expenses incurred in connection with representing the Settlement Class in this Action.

12. On behalf of Lead Counsel, for the reasons discussed herein and in the accompanying memoranda, we respectfully submit that the Settlement and the Plan of Allocation, are each "fair, reasonable, and adequate" in all respects, and that the Court should therefore approve them pursuant to Rule 23(e) of the Federal Rules of Civil Procedure. Likewise, we respectfully submit that the Fee and Expense Application is fair and reasonable and should be approved.

II. SUMMARY OF THE CLAIMS

13. On July 2, 2012, Duke merged with Progress to create the largest public electric utility company in the United States. ECF No. 60 at ¶ 3. This Action involves the terms, disclosures and omissions surrounding the Merger and, in particular, Defendants' alleged concealment of facts regarding their consideration and plan to disregard a fundamental term of the Merger and remove Johnson as the CEO of the newly combined company. *Id.* at ¶¶ 5, 209, 228.

14. Specifically, the [Corrected] Consolidated Complaint for Violation of the Federal Securities Laws dated January 29, 2013 (the "Complaint")[6] alleged that, on July 7, 2011, defendants Rogers, Gray, Duke, Good, Young, Barnet, Bernhardt, Browning, DiMicco, Forsgren, Hance, Reinsch, Rhodes and Sharp (collectively, the "Securities Act Defendants") filed a Registration Statement on Form S-4/A (the "Merger Registration Statement") and Prospectus filings (the "Prospectus Materials") with the SEC that contained numerous false and misleading representations concerning the Merger and the post-Merger CEO succession plan, including that (i) Progress's then-CEO Johnson would serve as the CEO and President of Duke and Duke's former CEO, Rogers, would step down; (ii) Johnson would have a three-year term of employment after the Merger was completed; (iii) Johnson's appointment was subject only to his ability and willingness to serve; and (iv) if Johnson was unable or unwilling to serve as such, the parties would confer and mutually designate a replacement. ECF No. 60 at ¶¶ 131-32,134, 236-42. The Complaint further alleged that these statements were false and misleading and omitted material facts because, *inter alia*, the Securities Act Defendants had internally determined that

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[6] The original Consolidated Complaint for Violation of the Federal Securities Laws was filed on January 28, 2013. ECF No. 58. The Complaint (as that term is used herein) refers to the [Corrected] Consolidated Complaint for Violation of the Federal Securities Laws, which was filed the next day and corrected non-substantive errors in the original complaint. ECF No. 60.

Johnson would not serve as Duke's long-term CEO and would instead be removed soon after the Merger was completed. *Id.* at ¶ 243.

15. Lead Plaintiffs also alleged that, between July 7, 2011 and July 2, 2012, the Securities Act Defendants publicly filed nearly 40 false and misleading Forms 8-K, Form 425 Prospectuses and "Merger Scorecards" that incorporated Defendants' prior misleading statements by reference and urged investors to read the Merger Registration Statement containing those statements. ECF No. 60 at ¶ 244 & n.9. Additionally, the Complaint alleged that, between July 7, 2011 and June 29, 2012, the Securities Act Defendants violated their duty to update or amend the Merger Registration Statement and Prospectus Materials by failing to disclose material adverse developments, including Duke's opposition to Johnson's role as CEO and the decision to remove him after the Merger. *Id.* at ¶¶ 245-46, 249.

16. Additionally, Lead Plaintiffs alleged that between June 11, 2012 and July 9, 2012, inclusive (the "Settlement Class Period"), defendants Duke, Rogers, Gray and Manly (collectively, the "Exchange Act Defendants") made false and misleading statements, including that (i) Johnson would be Duke's CEO and President after the Merger and (ii) Johnson had voluntarily resigned as President and CEO of Duke. ECF No. 60 at ¶¶ 250-59. The Complaint alleged that these statements were false and misleading because, *inter alia*: (i) the Exchange Act Defendants had already decided to remove Johnson as CEO and President and (ii) Johnson did not voluntarily resign but was forced out by legacy Duke directors. *Id.* at ¶¶ 260-61. Lead Plaintiffs further alleged that these false and misleading statements and omissions artificially inflated the price of Duke's common stock during the class period and that members of the proposed Settlement Class, including Lead Plaintiffs, suffered damages when disclosures

regarding Johnson's ouster as CEO caused the inflation to be removed from the price of Duke's common stock. *Id.* at ¶¶ 288-93.

17. In particular, from July 3, 2012 to July 9, 2012, following the Defendants' alleged disclosures that Johnson would no longer serve as CEO, as well as the relevant truth regarding the Exchange Act Defendants' conduct in ousting him, Duke's stock price declined $4.53 per share on unusually heavy trading volume. By July 9, 2012, Duke's stock price was trading at $65.31 per share, down from $71.13 on July 2, 2012 only four trading days earlier. ECF No. 60 at ¶¶ 41, 289.

III. HISTORY OF THE ACTION

A. Investigation Conducted Prior to Filing the Initial Complaint

18. Before filing the initial complaint, Lead Counsel began their investigation into the facts and circumstances surrounding the Merger and Johnson's departure. To that end, Lead Counsel conducted a thorough review and analysis of Duke's SEC filings, including the Merger Registration Statement, extensive Prospectus Materials, shareholder proxy materials and investor meeting transcripts, and prospectus updates on Forms 425 filed with the SEC between August 24, 2011 and June 28, 2012. Lead Counsel also began their review of extensive media coverage regarding Duke, Progress and the Merger, including statements made by former Progress directors. On July 6, 2012, the North Carolina Utilities Commission ("NCUC") initiated an investigation regarding the Merger and Johnson's departure. Lead Counsel analyzed the NCUC's investigative hearings and audio testimony in real-time as they occurred and reviewed transcripts of the testimony, including the testimony of defendants Rogers and Gray.

B. Filing of Initial Complaints, Consolidation of the Actions, Appointment of Lead Plaintiffs and Lead Counsel

19. On July 24, 2012, James Craig filed the first securities class action complaint captioned *Craig v. Duke Energy Corporation, et al.*, No. 12-cv-00461 (E.D.N.C.), against defendants Duke, Rogers, Good and Young, as well as legacy Duke directors Barnet, Bernhardt, Browning, DiMicco, Forsgren, Gray, Hance, Reinsch, Rhodes and Sharp for violations of both the Securities Act and the Exchange Act . On the same day, Maurine Nieman filed a putative class action complaint captioned *Nieman v. Duke Energy Corporation, et al.*, No. 12-cv-00456 (W.D.N.C.), alleging Securities Act claims against the same defendants. Subsequently, on July 30, 2012, Michael William Sunner and Dr. Gladys Sunner filed a similar complaint captioned, *Sunner v. Duke Energy Corporation, et al.*, No. 12-cv-00474 (W.D.N.C.) against the same defendants except Good and Young for violations of the Exchange Act.

20. At a hearing on September 10, 2012, the Honorable Judge Frank D. Whitney granted a joint oral motion to consolidate *Nieman v. Duke Energy Corporation, et al.*, 12-cv-00456 (W.D.N.C.) and *Sunner v. Duke Energy Corporation, et al.*, No. 12-cv-00474 (W.D.N.C.). ECF No. 10. On September 12, 2012, Mr. Craig voluntarily dismissed *Craig v. Duke Energy Corporation, et al.*, No. 12-cv-00461 (E.D.N.C.). On September 20, 2012, Mr. Craig re-filed his complaint in the Western District of North Carolina as *Craig v. Duke Energy Corp., et al.*, No. 12-cv-00624 (W.D.N.C.).

21. In accordance with the PSLRA, on September 24, 2012, Gerald Friesen, Carolyn Friesen and Craig Bacino, individually and as Trustee for the Janice and Craig Bacino Trust moved for consolidation of all related actions, appointment as lead plaintiffs and approval of Kessler Topaz as lead counsel. ECF No. 19-20. The same day, Amalgamated Bank also moved to be appointed as lead plaintiff and sought approval of Robbins Geller as lead counsel. ECF

Nos. 16-17. Only two other motions for lead plaintiff were received and no institutional investor, other than Amalgamated Bank, moved to lead the litigation. ECF Nos. 14-15, 21-22. All competing movants filed opposition briefs. ECF Nos. 30, 32-34, 36-39.

22. On October 17, 2012, at the request of lead plaintiff movants, this Court consolidated all actions under the caption *Nieman v. Duke Energy Corporation, et al.*, No. 12-cv-00456 (W.D.N.C.). ECF No. 35. By the same order, the Court referred all pre-trial matters to Magistrate Judge Cayer, except for the motions for appointment of lead counsel. *Id.*

23. After conferring in good faith, the competing movants submitted a joint stipulation on December 13, 2012, seeking: (i) the appointment of Gerald Friesen, Carolyn Friesen and Craig Bacino, individually and as Trustee for the Janice and Craig Bacino Trust, and Amalgamated Bank as lead plaintiffs and (ii) appointment of Kessler Topaz and Robbins Geller as lead counsel, and Blue Stephens & Fellers LLP as liaison counsel. ECF No. 45. No party or counsel contested the stipulation or otherwise sought to lead the litigation. On December 14, 2012, this Court granted the stipulation, appointing Amalgamated Bank, Gerald Friesen, Carolyn Friesen and Craig Bacino as Lead Plaintiffs; Kessler Topaz and Robbins Geller as Lead Counsel; and Dhamian Blue of Blue Stephens & Fellers LLP as liaison counsel. ECF No. 46.

C. Lead Counsel's Comprehensive Investigation and Legal Research

24. Before filing the Complaint, Lead Counsel, building upon their initial investigation, engaged in a comprehensive investigation of the facts underlying this Action. Lead Counsel obtained, reviewed and analyzed thousands of pages of documents, including Duke's and Progress's SEC filings, press releases, conference call transcripts, analysts' reports and the extensive coverage of the companies and Merger in the news media. More specifically, Lead Counsel reviewed and analyzed the Merger Registration Statement, the Merger Agreement and Prospectus Materials, which contained the majority of the false statements alleged in the

Complaint. Lead Counsel also reviewed the Forms 10-K, 10-Q and 8-K filed by Progress and Duke between 2010 and 2012. Additionally, Lead Counsel reviewed and carefully analyzed the over 40 Form 425 and Form 8-K filings and the Merger Scorecards detailing the status of the Merger, which incorporated by reference the allegedly false and misleading statements contained in the Merger Registration Statement and, thus, served as a basis for the Securities Act claims. Lead Counsel also reviewed over 200 analyst reports covering Duke and Progress between 2011 and 2012 to evaluate the materiality of the statements and develop a loss causation theory. Given the size of the two companies, media coverage of Duke and Progress in general, and the Merger in particular, was extensive. Lead Counsel reviewed thousands of pages of this media coverage and interview material, which yielded numerous facts that were included in the Complaint. *See, e.g.*, ECF No. 60 at ¶¶ 210, 217, 228, 233.

25. Given that the deal between Duke and Progress merged two of the country's largest energy companies, the Merger required approval from several state and federal agencies. Thus, in addition to the materials typically reviewed in securities actions, Lead Counsel also reviewed and analyzed thousands of pages of hearing transcripts, regulatory filings and documents produced to these agencies both before and after the Merger.

1. Review and Analysis of NCUC Filings

26. Lead Counsel obtained a significant cache of documents and information from the NCUC's review of the Merger. Specifically, Lead Counsel reviewed and analyzed thousands of pages of documents filed with the NCUC leading up to the close of the Merger, including over 1,500 pages of testimony from the following transcripts:

- September 15, 2011 transcript of rebuttal testimony of Lynn J. Good and others (1 volume; 77 pages);
- September 20, 2011 hearing transcripts (2 volumes; 324 pages);

- September 21, 2011 hearing transcripts (2 volumes; 435 pages);
- September 22, 2011 hearing transcripts (2 volumes; 453 pages);
- September 27, 2011 hearing transcripts (2 volumes; 158 pages);
- May 20, 2012 transcript of direct testimony of James E. Rogers, William D. Johnson, Lynn J. Good, and Dr. Joseph P. Kalt in support of the Merger (1 volume; 60 pages); and
- June 25, 2012 hearing transcript (1 volume; 74 pages).

27. Lead Counsel also analyzed hundreds of additional related-filings, including, *inter alia*: (1) commentary filed by several organizations, such as the North Carolina Sustainable Energy Association, North Carolina Waste Awareness and Reduction Network and North Carolina Coalition of Concerned Businesses and Consumers, opposing the Merger; (2) Public Staff commentary; and (3) Duke's and Progress's responses to the commentary. These pre-Merger filings provided Lead Plaintiffs with crucial background information for the Complaint, including the reasons why Johnson's employment was a key term to the Merger Agreement.

28. The post-Merger filings were even more important for drafting the Complaint, as they provided many of the details regarding the facts and circumstances surrounding Johnson's ouster. On July 6, 2012, after Johnson's departure became public, the NCUC initiated an investigation into the Merger and Johnson's removal. Likewise, the North Carolina Department of Justice (the "NC DOJ") launched a separate investigation into Duke's conduct surrounding the Merger. As part of these investigations, the NCUC heard testimony from witnesses involved in the transaction including, *inter alia*, Johnson, Rogers and other defendants. Specifically, Lead Counsel reviewed and analyzed over 650 pages of transcripts from the NCUC proceedings, including the following:

- July 10, 2012 hearing transcripts of the testimony of James Rogers (2 volumes; 141 pages);

- July 19, 2012 hearing transcripts of the testimony of William D. Johnson, E. Marie McKee, and James B. Hyler, Jr. (2 volumes; 274 pages);

- July 20, 2012 hearing transcripts of the testimony of Ann M. Gray and Michael Browning (2 volumes; 182 pages); and

- July 25, 2012 transcript of the direct testimony of representative of Jennifer S. Ellis on behalf of Progress Energy Carolinas, Inc. and Emily O. Felt on behalf of Duke Energy Carolinas, LLC, including exhibits (1 volume; 76 pages).

29. The NCUC also ordered Duke and the legacy Progress directors to produce internal documents regarding the circumstances surrounding Johnson's removal. Lead Counsel reviewed and analyzed over 5,000 pages of documents produced in the NCUC investigation, including the following:

- August 7, 2012 document production by Duke (606 pages) consisting of (1) employment contracts; (2) Duke's Board of Directors (the "Board") and Board committee minutes, notes and other communications dating back to July 1, 2010; (3) memoranda, letters, e-mails, or other communications to and from Board members dating back to July 1, 2010; and (4) e-mails between Board members, including James E. Rogers, dating back to December 1, 2011;

- August 21, 2012 document production by Duke (345 pages) consisting of documents initially withheld as privileged in Duke's first production;

- November 5, 2012 document production by legacy Progress directors (2,195 pages) consisting of internal communications and related materials; and

- November 5, 2012 document production by Duke (2,676 pages) largely consisting of documents that Duke initially designated as privileged or confidential.

30. Duke entered into settlement agreements with the NCUC and the NC DOJ on November 29, 2012 and December 3, 2012, respectively. Lead Counsel carefully analyzed the settlement agreement, the detailed terms and conditions imposed on Duke and related documents as well as the extensive commentary and opposition in response to the settlements.

2. Review and Analysis of Additional Regulatory Filings Related to the Merger

31. In addition to NCUC's extensive docket, Lead Counsel also reviewed documents from several other agencies regarding the Merger. For instance, Lead Counsel reviewed and analyzed:

- Documents related to the Federal Energy Regulatory Commission's approval of the Merger subject to certain conditions;
- Filings from *In re Progress Energy Shareholder Litigation*, 11 CVS 739, a consolidated class action lawsuit in the North Carolina Business Court seeking to block completion of the Merger;
- The transcripts of August 13, 2012 hearing before the Florida Public Service Commission (2 volumes; 112 pages); and
- Documents related to the Indiana Regulatory Commission investigation into ethical violations by Duke, including internal Duke e-mails.

3. Extensive Research Regarding the Claims

32. While mergers are not an uncommon subject of securities litigation, the facts underlying this Action were unique for a securities claim, as the alleged misrepresentations were specifically related to Johnson's employment and termination as a material term of the Merger. Because this Action involved a distinctive fact pattern and novel legal issues, Lead Counsel conducted extensive research before filing the Complaint to understand exactly which theories of liability Lead Plaintiffs could allege and how to allege them given the current state of the law. For instance, one of the novel issues in this Action involved identifying the relevant dates for evaluating the falsity of statements under §§ 11 and 12(a)(2) of the Securities Act in the context of a Merger that was not consummated until nearly a year after the operative Merger Registration Statement was initially filed. Lead Counsel comprehensively researched when the Merger Registration Statement would be deemed effective under § 11, including contradictions between the dates Duke and the SEC identified as the "effective date" in relevant filings. Likewise, for

purposes of evaluating § 12(a)(2) claims, Lead Counsel performed substantial legal and factual research on when Defendants were deemed irrevocably "committed" to the securities transactions—an apparently undecided legal issue in the Fourth Circuit. Lead Counsel also analyzed whether the Forms 425 and Merger Scorecards could be used as a basis for Lead Plaintiffs' Securities Act claims.

33. Additionally, Lead Counsel thoroughly vetted and researched when a party has a duty to disclose material information pertaining to the appointment of a CEO in the merger context. One of the pertinent questions here was: When exactly were the Defendants obligated to disclose their opposition to Johnson becoming Duke's new CEO? This required an in-depth analysis of the case law regarding, among other topics, the materiality of contingent plans, the duty to disclose a "change of heart" in a merger context, and what duties arise when a party chooses to speak on a matter. Additionally, Lead Counsel evaluated the law regarding duties to correct or update prior disclosures that were true when made but later became misleading. Needless to say, the case law on these issues in a merger context was sparse.

34. The facts supporting loss causation also presented challenges given that Duke's stock price declined over several days and in response to multiple announcements of news. Accordingly, Lead Counsel researched these issues at length, expecting that Defendants would attack Lead Plaintiffs' loss causation theory in their motion to dismiss (which they did). In addition to the more salient issues outlined above, Lead Counsel also extensively researched the Fourth Circuit's jurisprudence regarding, *inter alia*, the applicable pleading standards for § 11 and § 12(a)(2) claims and whether allegations of culpable participation were required to plead control person liability under § 15 of the Securities Act or § 20(a) of the Exchange Act.

D. The Consolidated Amended Complaint

35. On January 29, 2013, Lead Counsel filed the 338-paragraph Complaint, incorporating the results of their comprehensive legal analysis and robust investigation, including the information gathered from analyzing Defendants' testimony and internal Duke documents. ECF No. 60. The Complaint alleged that the Securities Act Defendants violated §§ 11, 12(a)(2), and 15 of the Securities Act. The Complaint also alleged that the Exchange Act Defendants violated § 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder and that defendants Rogers, Gray and Manly violated § 20(a) of the Exchange Act.

36. More specifically, the Complaint alleged that the Securities Act Defendants violated §§ 11 and 12(a)(2) of the Securities Act by filing a Merger Registration Statement and Prospectus Materials that contained false and misleading representations and omitted material facts. The Complaint also alleged that, between July 7, 2011 and July 2, 2012, the Securities Act Defendants publicly filed nearly 40 false and misleading Forms 8-K, Form 425 Prospectuses and "Merger Scorecards" that incorporated those misleading statements by reference and urged investors to read the Merger Registration Statement containing those statements. As a direct and proximate result of Defendants' alleged violations of §§ 11 and 12(a)(2), Lead Plaintiffs and the members of the class who acquired Duke common stock pursuant to and/or traceable to the Merger Registration Statement and Prospectus Materials were damaged. Additionally, the Complaint alleged that the Securities Act Defendants (other than Duke) violated § 15 of the Securities Act as control persons of Duke based on their signing of the Merger Registration Statement and filing of the Prospectus Materials.

37. The Complaint also alleged that the Exchange Act Defendants violated § 10(b) of the Exchange Act and Rule 10b-5 by knowingly or recklessly making false statements, omitting material facts and engaging in a fraudulent course of conduct to artificially inflate the market

price of Duke's common stock. The Complaint alleged that the Exchange Act Defendants' statements and omissions during the period June 11, 2012 to July 9, 2012, including in certain of the offering documents, deceived investors, including Lead Plaintiffs and members of the class, and caused Lead Plaintiffs and other class members to purchase Duke common stock at inflated prices. As a direct and proximate result of the Exchange Act Defendants' conduct, Lead Plaintiffs alleged that they and other members of the class suffered damages in connection with their purchases of Duke common stock. The Complaint also alleged that defendants Rogers, Gray and Manly violated § 20(a) of the Exchange Act based on their direct participation in disseminating the false and misleading statements.

E. Motion to Dismiss and Magistrate Judge Cayer's Recommendation

38. On April 2, 2013, Defendants moved to dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(6). ECF Nos. 68, 68-1. In their Motion to Dismiss, Defendants argued for the dismissal of Lead Plaintiffs' Securities Act claims on the grounds that the Complaint failed to allege facts showing that the Merger Registration Statement was false or misleading as of the relevant dates and the Individual Defendants were not "statutory sellers." In particular, Defendants argued that:

- A class of pre-merger Progress shareholders entered into a settlement and release that barred Lead Plaintiffs' claims;
- The alleged statements were not false and misleading under § 11 because the Complaint failed to allege facts indicating that Duke had decided to remove Johnson before the Merger Registration Statement was effective on July 7, 2011;
- Likewise, the statements were not false and misleading under § 12(a)(2) because no allegation indicated that Duke made a final decision before the shareholders approved the merger on August 23, 2011 and were, therefore, "committed" to sell the securities; and
- The Securities Act Defendants were not "statutory sellers" for merely signing the Merger Registration Statement.

39. As for the Exchange Act claims, Defendants argued that Lead Plaintiffs failed to sufficiently plead any false or misleading statements, a strong inference of scienter or loss causation. More specifically, they challenged the Exchange Act claims on the grounds that:

- The alleged statements were accurate when made or immaterial to investors;
- Defendants had no duty to disclose preliminary discussions regarding Johnson's future role at Duke, as the Company had not made a decision regarding Johnson's termination;
- Defendant Gray did not "make" any misleading statements; thus, she could not be held liable for the statements of others;
- The Complaint failed to plead a strong inference of scienter because a corporation may withhold information to further its competitive interests or the completion of a merger and the Lead Plaintiffs failed to articulate any motive to defraud investors;
- Lead Plaintiffs failed to allege loss causation, as the drop in Duke's stock price began two days before the alleged corrective disclosures, and the allegedly corrective disclosures revealed no new information to the market; and
- The § 20(a) claims failed because Lead Plaintiffs failed to plead a primary violation under § 10(b) and the Complaint failed to allege Manly's "culpable participation," "ultimate authority" or meaningful "control."

40. On June 3, 2013, based on extensive legal research and comprehensive briefing, Lead Plaintiffs opposed defendants' Motion to Dismiss. ECF No. 69. Lead Plaintiffs vigorously defended their claims under §§ 11 and 12(a)(2) of the Securities Act, arguing that, *inter alia*:

- The settlement in the prior shareholder litigation did not bar this Action, as the settlement occurred before Johnson's ouster and did not arise from an "identical factual predicate" necessary to release such future unrelated claims;
- For purposes of evaluating falsity under § 11, the Merger Registration Statement became effective on July 2, 2012, not on July 7, 2011, as set forth in the Merger Registration Statement itself;
- For purposes of evaluating falsity under § 12(a)(2), the relevant date could not be August 23, 2011, as several conditions precedent remained outstanding up until the completion of the Merger;
- Regardless of the relevant dates under §§ 11 and 12(a)(2), the Complaint alleged sufficient facts demonstrating the falsity of the statements as of July 7, 2011 and

August 23, 2011, and the Securities Act Defendants had a duty to update investors of any fundamental changes to the Merger Registration Statement; and

- The Securities Act Defendants were statutory sellers, as the Complaint alleged that the Company directly sold Duke stock to Progress shareholders, and the Individual Defendants signed the Merger Registration Statement and were actively involved in soliciting the sale of Duke stock by, among other things, issuing false Prospectuses through June 29, 2012.

41. Lead Plaintiffs also defended the Exchange Act claims, arguing that they adequately pled the falsity of Defendants' statements and omissions, a strong inference of scienter and loss causation. In particular, Lead Plaintiffs argued, *inter alia*, that:

- The Exchange Act Defendants' statements were false and misleading because they referred to the Merger Registration Statement, which assured the public that Johnson would be Duke's long-term CEO and President, and claimed that Johnson had resigned when, in fact, he had been voted out;

- Because the Exchange Act Defendants chose to speak regarding the Merger, they had a duty to disclose all material information to make the disclosure complete and accurate;

- Several allegations supported a strong inference of scienter, including: (1) Defendants' work with outside counsel to plan Johnson's removal in May 2012; (2) their retention of a public relations firm to deal with any resulting fallout around the same time; and (3) allegations predicated on internal emails obtained by Lead Counsel regarding meetings and communications between mid-May and June 2012;

- The Exchange Act Defendants had a motive to hide the truth because they knew that replacing Johnson would result in a $675 million penalty;

- Lead Plaintiffs adequately pled loss causation by identifying the disclosures that revealed the relevant truth about defendants' misconduct and alleging that the price of Duke's stock declined in response; and

- Culpable participation was not required to plead a § 20(a) violation and, even if it were, defendant Manly signed the SEC filing containing the false statements.

42. On July 3, 2013, Defendants filed a reply brief in support of their Motion to Dismiss, reiterating their arguments. ECF No. 70.

43. On July 26, 2013, Magistrate Judge Cayer issued a Memorandum & Recommendation (the "Recommendation") to deny the Motion to Dismiss in full. ECF No. 71. In particular, Judge Cayer found that, among other things:

- Lead Plaintiffs adequately pled § 11 claims, as the effective date for the Merger Registration Statement was July 2, 2012 and the Complaint contained ample facts establishing that Defendants' statements were false even a year earlier, before July 2011;

- Lead Plaintiffs adequately pled their § 12(a)(2) claims, given that Defendants had a duty to correct or amend the Merger Registration statement to reflect any significant changes in their position;

- It was premature to determine whether Defendants were statutory sellers within the meaning of § 12(a)(2);

- Defendants' statements were misleading as investors likely would have considered Johnson's departure to be material;

- Several allegations supported a strong inference of scienter, including Defendants' hiring of outside counsel to plan Johnson's removal, their retention of a public relations firm to manage the fallout, and the internal communication in May and June 2012 evidencing that Johnson's ouster was planned in advance; and

- Lead Plaintiffs adequately pled a causal connection between Defendants' misconduct and Lead Plaintiffs' losses to establish loss causation.

44. On August 6, 2013, the Parties jointly moved to extend the deadline for defendants to file their objections to the Recommendation. ECF No. 72. The Court granted the extension on August 12, 2013. ECF No. 73.

F. Objections to the Recommendation

45. On August 19, 2013, Defendants filed their Objections to the Memorandum and Recommendation on Defendants' Motion to Dismiss (the "Objection"). ECF No. 74. As an initial matter, Defendants argued that the entire Complaint should be dismissed because (1) the Board had no duty to disclose its internal deliberations before voting to discharge Johnson and (2) the Complaint failed to allege facts indicating that the Board reached a final decision before

July 2, 2012. Additionally, Defendants argued that Lead Plaintiffs' Securities Act claims should have been dismissed because:

- The statements were accurate as of the relevant dates—*i.e.*, July 7, 2011 under § 11 and August 23, 2011 under § 12(a)(2);

- The incorporation of the Merger Registration Statement into other prospectuses was irrelevant, as those prospectuses were not incorporated into the Merger Registration Statement, which still had an effective date of July 7, 2011;

- Defendants did not have a duty to update the Merger Registration Statement after its filing;

- Simply signing the Merger Registration Statement did not render the Individual Defendants "statutory sellers" under § 12(a)(2);

- The prior shareholder settlement barred the Action because North Carolina law allows the release of "related" claims in a prior action and does not require an "identical factual predicate" for a valid release; and

- Magistrate Judge Cayer should have applied a Rule 9(b) pleading standard to the § 11 and § 12(a)(2) claims instead of a Rule 8 pleading standard.

46. Defendants also challenged Judge Cayer's rulings on the Exchange Act claims. In particular, Defendants argued that the Recommendation erred because:

- Lead Plaintiffs failed to allege a strong inference of scienter because the allegations did not indicate that Defendants had made a final decision that was ripe for disclosure prior to the Board's final vote;

- The Complaint failed to allege that Defendants were aware of their duty to disclose any information before a final vote;

- Defendants had no motive to defraud investors, as Duke likely would not have incurred a $675 million penalty if Progress believed that Duke had breached the agreement;

- Defendants Gray and Manly did not "make" any statements, as they did not have "ultimate authority" or meaningful "control" over the statements; and

- Magistrate Judge Cayer failed to evaluate the allegations under the PSLRA's strict pleading requirements.

47. On September 20, 2013, Lead Plaintiffs opposed the Objection, arguing that Magistrate Judge Cayer had rightly recommended sustaining the Complaint in full. ECF No. 78. Before turning to the merits of the motion, Lead Plaintiffs argued that:

- Defendants improperly objected to the Recommendation, as their Objection rehashed the same arguments from their Motion to Dismiss without identifying the specific errors in the Recommendation; and

- Magistrate Judge Cayer correctly evaluated the Securities Act claims under a Rule 8 standard because those claims were distinct from the § 10(b) claims, and Judge Cayer, in fact, applied Rule 9(b) and the PSLRA standards to the Exchange Act claims.

48. Additionally, Lead Plaintiffs defended the Recommendation's analysis of the Securities Act claims, arguing that:

- Defendants' statements and omissions were material;

- Defendants' disclosure obligations did not depend on the Board's final vote; rather, their obligations depended on the materiality of the omitted information;

- Because Defendants chose to speak about Johnson and the Merger, Defendants had a duty to speak completely and truthfully, including their intentions to ouster Johnson, regardless of the SEC's Form 8-K requirements;

- For the § 11 claims, the Merger Registration Statement became effective on July 2, 2012, when the new registered Duke shares first became available, and in any event, the Complaint alleged sufficient facts to show that the Merger Registration Statement was false as of July 7, 2011;

- For the § 12 claims, the "commitment" date was July 2, 2012, the date of the completed Merger occurred when all of the significant conditions were fulfilled;

- Defendants had a duty to correct or amend the Merger Registration Statement to reflect the changes in their position;

- The prior shareholder settlement did not bar Lead Plaintiffs' claims, as Lead Plaintiffs' claims did not even exist at the time of the waiver and they did not arise out of a similar factual predicate; and

- Determining whether defendants were statutory sellers is inappropriate at the motion to dismiss stage; but even if it were not, the Complaint alleged that Duke—not an underwriter as in defendants' cited authority—directly offered the shares.

49. Lead Plaintiffs also defended Magistrate Judge Cayer's decision to sustain the Exchange Act claims. As an initial matter, Lead Plaintiffs claimed that Defendants' arguments were too generalized to merit *de novo* review; thus, the court should afford deference to the Magistrate's determinations. Additionally, Lead Plaintiffs argued that:

- Judge Cayer correctly found that Lead Plaintiffs adequately pled the materiality of Defendants' statements, as it was highly likely that investors would consider Johnson's removal as significantly altering the total mix of information available;
- As for scienter, the only cogent inference was that Defendants knowingly concealed the plan to remove Johnson as CEO given that, in May, 2012, Duke's Board met with outside counsel to plan the removal and defendants retained a public relations firm to manage the fallout;
- Defendants could not avoid an inference of scienter by simply claiming ignorance of the federal securities laws;
- The $675 million penalty motivated Defendants to conceal the truth;
- Both defendants Manly and Gray had ultimate authority for the false and misleading statements during the class period; and
- As to the §20(a) claims, no culpable participation was required to plead the claim; but even if it were, Lead Plaintiffs adequately alleged culpable participation for defendant Manly.

50. On October 2, 2013, the Court heard extensive oral argument from the Parties regarding the Objection. ECF No. 80. Thereafter, the Parties informed the Court that they had initiated settlement discussions. *See infra* ¶¶ 63-69. On September 30, 2014, as settlement negotiations progressed, Defendants, with Lead Plaintiffs' consent, requested that the Court permit the withdrawal of their Motion to Dismiss without prejudice. ECF No. 84. On that same day, the Court granted Defendants' motion for withdrawal. ECF No. 86.

G. Informal and Formal Discovery

51. Because the Court had not yet adopted Judge Cayer's Recommendation denying Defendants' Motion to Dismiss, formal discovery in this Action was stayed pursuant to the

PSLRA. Nevertheless, Lead Counsel developed a robust evidentiary record through informal discovery produced in connection with the NCUC's investigation of the Merger and other regulatory proceedings before the Merger was approved. As detailed in Section C above, Duke produced thousands of documents related to the Merger and several of the Settling Defendants testified regarding the facts and circumstances both before and after the Merger. As a result, Lead Counsel developed and analyzed substantial documentary evidence and discovery before reaching the Settlement that allowed Lead Counsel to adequately assess the strengths and weaknesses of the case.

52. The NCUC investigation included testimony from key witnesses involved in the Merger, including defendants Rogers, Gray and Browning, as well as witnesses from Progress, including Johnson and legacy Progress directors E. Marie McKee and James B. Hyler. The testimony of these witnesses, as well as the thousands of pages produced in the investigation, provided Lead Counsel with informal discovery regarding the facts of the case, including facts supporting the falsity of the Settling Defendants' statements, the materiality of the undisclosed information and the scienter of the Exchange Act Defendants.

53. Determining when the Settling Defendants materially decided to terminate Johnson as CEO was a key factual issue in this Action, as it would inform the falsity of the statements made in the Merger Agreement and Prospectus Materials assuring investors that Johnson would become Duke's CEO. Two Settling Defendants, Gray and Browning, provided extensive testimony regarding the internal deliberations of Duke's Board before the Merger about Johnson's future role at the Company. For instance, Lead Counsel analyzed and developed the following facts from Grays' testimony and heavily cited to these facts in the Complaint:

- In November 2010, Duke directors already had negative impressions of Johnson, ECF No. 60 at ¶ 19;

- In June 2011, Duke directors continued to have concerns about Johnson being CEO, *id.* at ¶ 23;

- By May 2012, the Defendants were focused on the conclusion that Johnson would not be Duke's future CEO, *id.* at ¶¶ 28, 30;

- The Board understood that they could not remove Johnson as CEO before the close of the Merger because the Merger Agreement required that Johnson would become Duke's CEO, *id.* at ¶ 29;

- The Board chose not to meet with Johnson after June 2011 because of their negative impression of Johnson as a result of meeting with him in November 2010 and June 2011, *id.* at ¶¶ 124-26;

- In May 2012, the Board met with outside counsel to undertake formal analysis of their options and whether or not to keep Johnson, *id.* at ¶ 159;

- The Board discussed its options and concluded that Johnson should not become Duke's future CEO, *id.* at ¶¶ 159, 163-67;

- In June 2012, Rogers agreed to step in as Duke's CEO, *id.* at ¶ 171;

- The Board claimed that it did not disclose their decision to terminate Johnson because they did not have a final vote, and therefore, on the advice of counsel, they could not disclose the decision to the NCUC or in public filings, *id.* at ¶ 173; and

- At an executive session on June 26, 2012, the Duke Board confirmed that decision that Johnson would not be CEO, *id.* at ¶ 175.

54. Defendant Browning also testified regarding the Board's internal deliberations before the Merger and their assessment of Johnson. Lead Counsel developed and cited the following facts from Browning's testimony:

- In January 2011, Board members were concerned whether Johnson should be CEO, *id.* at ¶¶ 21, 99;

- Browning had lost confidence that Johnson would be able to lead Duke, *id.* at ¶¶ 30, 168;

- Around February or March 2011, the Board was receiving information that there were integration issues between the two companies, and asked Rogers to meet with Johnson, *id.* at ¶ 111; and

- Rogers spoke to Johnson about the Board's concern regarding integration problems in April 2011, *id.* at ¶ 117.

55. Additionally, Johnson provided detailed testimony regarding his experience with Duke's Board leading up to the Merger and his eventual departure from Duke. Lead Counsel developed the following facts from Johnson's testimony and incorporated them into the Complaint:

- Duke's reasons for merging with Progress and initially proposing that Johnson be the future CEO of the merged company, ECF No. 60 at ¶¶ 82, 85;
- In June 2011, Duke's directors expressed concerns regarding the integration of the two companies, *id.* at ¶ 23;
- Johnson last met with Duke's directors in June 2011 and was assured that there was no need to meet with the Board and therefore the Duke Board had little opportunity to actually observe Johnson's leadership style, *id.* at ¶¶ 24, 123, 145, 162;
- Between December 2011 and June 2012, Johnson rarely interacted with Duke directors or employees, *id.* at ¶ 25;
- After FERC initially rejected the mitigation plan, tensions rose and Duke attempted to renegotiate the Merger and potentially withdraw from the deal, but Johnson expressed that reneging on the Merger would result in a $675 million penalty, *id.* at ¶¶ 26-27, 146-49;
- Progress hired attorneys to ensure that the Merger would close, *id.* at ¶150; and
- During the six months before the Merger closed, Duke intimated that it would back out of the deal, *id.* at ¶156.

56. The document productions also provided considerable insight into the Settling Defendants' internal deliberations regarding Johnson. For instance, Lead Counsel gathered the following evidence from the NCUC document productions and incorporated this evidence into the Complaint:

- November 21, 2010 e-mail from DiMicco questioning Johnson's role as CEO, *id.* at ¶¶ 20, 96, 114;
- November 2010 Board minutes indicating that defendants were already considering "cultural issues" and "leadership style", *id.* at ¶ 97;

- April 2011 e-mail evidencing tensions between Johnson and Duke's Board regarding integration efforts, *id.* at ¶¶ 21, 114, 118-19;
- June 6, 2011 e-mail from Bernhardt evidencing tension between Duke's Board and Johnson, *id.* at ¶ 122; and
- June 2012 e-mails between several directors evidencing that the directors performed a "dry run" in advance of the official call to be held after the Merger, *id.* at ¶ 176.

57. As noted above, the Complaint relied heavily on the documents and transcripts carefully selected by Lead Counsel from the NCUC's docket. *See also generally* ECF No. 60 at ¶¶ 19-40. Moreover, the facts that Lead Counsel culled from the NCUC materials were crucial to surviving defendants' Motion to Dismiss (discussed above in Section III.E). Indeed, when Magistrate Judge Cayer recommended sustaining Lead Plaintiffs' Complaint in full, he relied on several allegations that were derived from the documents and transcripts Lead Counsel obtained from the NCUC. *See* ECF No. 71. For instance, Judge Cayer cited the internal e-mails above evidencing that "Defendants had mounted significant yet undisclosed opposition to Johnson prior to July 2011." *Id.* at 12; *see also id.* at 2 (citing November 21, 2010 internal e-mail from defendant DiMicco to defendant Rogers objecting to Johnson serving as CEO (ECF No. 60 at ¶¶ 20, 96)); *id.* at 3 (citing April 4, 2011 e-mail from defendant Rogers stating that "at this time we have a conflict" with Johnson and Progress's "tone/arrogance/lack of respect/inflated sense of capability" (ECF No. 60 at ¶¶ 21, 114)). In concluding that Lead Plaintiffs pled a strong inference of scienter, Judge Cayer referred to certain facts exclusively derived from the NCUC materials, including the allegations that Defendants worked with outside counsel on a plan to remove Johnson, retained a public relations firm to deal with the anticipated fallout and exchanged e-mails indicating that Johnson's ouster was pre-meditated. *See id* at 5-6, 15; ECF No. 60 at ¶¶ 163-76.

58. Given that Magistrate Judge Cayer recommended sustaining the Complaint in full, Lead Counsel began preparing discovery, anticipating that the discovery stay would be lifted if the Court decided to adopt the Recommendation. To that end, Lead Counsel prepared the following discovery: (i) Initial Disclosures pursuant to Rule 26(a)(1); (ii) requests for production of documents consisting of 75 targeted requests; and (iii) subpoenas to be issued to more than 20 key third parties, including Duke's auditor Deloitte, the public relations firm International Strategy & Investment Group LLC, underwriters to the offering, Duke's law firm and analysts who covered Duke and Progress. At the time of settlement, Lead Plaintiffs were in the process of reviewing and analyzing the information gathered to date for purposes of drafting additional discovery.

H. Lead Plaintiffs' Work with In-House and Outside Experts

59. In prosecuting this Action, Lead Counsel retained Chad W. Coffman, a consulting expert regarding loss causation and damages. Mr. Coffman is the President of Global Economics Group, a Chicago-based firm that specializes in the application of economics, finance, statistics and valuation principles to facts that arise in a variety of contexts, including litigation. Mr. Coffman performed a robust analysis of the damages for the claims under §§ 11 and 12(a)(2) of the Securities Act as well as an analysis of the claims under § 10(b) of the Exchange Act and Rule 10b-5. For the § 10(b) claims, Mr. Coffman performed a comprehensive loss causation and damages analysis for Lead Counsel, including an event study, regression, and an analysis of the abnormal residual returns for the corrective disclosure dates. This analysis was also used to assess Defendants' causation defense for the Securities Act claims. Further, Lead Counsel utilized Mr. Coffman and his firm's damages and loss causation analysis during mediation and in developing the proposed Plan of Allocation in this matter.

60. In addition to Mr. Coffman and Global Economics Group, Lead Counsel utilized the services of their in-house economics experts. These experts modeled the potential damages suffered by Lead Plaintiffs and the class and identified micro- and macroeconomic factors that could have impacted Duke's stock price.

IV. THE SETTLEMENT

61. The Settlement provides for the recovery of $146,250,000 million in cash, plus any interest earned on those funds while in escrow. The Settlement Amount is a non-reversionary common fund, *i.e.*, it is not a claims-made settlement, and following final approval of the Settlement, none of the Settlement Fund shall be returned to any Settling Defendant and/or such other persons or entities funding the Settlement.

62. As set forth herein, the Settlement, if approved, will provide members of the proposed Settlement Class with immediate benefits and eliminate the significant risks of continued litigation under circumstances where a favorable outcome was not guaranteed.

A. Settlement Negotiations

63. The Settlement is the result of contentious, arm's-length negotiations over an eight-month period, following substantial investigation and analysis of the available evidence, extensive briefing at the motion to dismiss stage, as well as comprehensive briefing for mediation. The Parties' good faith efforts to settle this Action also included in-person and telephonic discussions, including a formal mediation.

64. Following completion of briefing on Defendants' Objection to the Recommendation (*see* Section III.F above), the Parties began initial discussions regarding the possibility of resolving the Action, including several telephonic discussions. After several initial discussions, the Parties informed the Court that they were engaging in settlement negotiations

and requested that the Court hold its decision on the Objection in abeyance while Parties conducted their negotiations.

65. On March 12, 2014, Lead Counsel, Liaison Counsel, counsel for the Settling Defendants and representatives from Duke's General Counsel's office, met in Charlotte, North Carolina to discuss a potential settlement. At the meeting, the Parties addressed the strengths and weaknesses of the case and engaged in a discussion of the disputes of law and fact, including a new decision by the Fourth Circuit regarding the "effective date" issue discussed above. Lead Plaintiffs presented the results of their loss causation and damages analysis and made an initial settlement demand. At this time, however, the Parties remained far apart in their respective positions to resolve the Action. Subsequently, following multiple telephonic conferences, the Parties agreed to engage a mediator to assist with the settlement negotiations.

66. To facilitate the settlement discussions, the Parties exchanged the names of several mediators experienced in settling securities class actions. Following exchanges regarding the viability and experience of the proposed mediators, the Parties mutually agreed on the Honorable Layn R. Phillips (Ret.), a former United States District Court Judge who also sat by designation on the Tenth Circuit Court of Appeals. Judge Phillips is a highly respected mediator with extensive experience in the mediation of complex securities litigation.

67. On May 14, 2014, the Parties participated in an in-person mediation session in New York City under the supervision of Judge Phillips. In advance of the mediation, on April 23, 2014, the Parties exchanged comprehensive mediation briefing detailing their respective positions on the relevant law and facts. Subsequently, on May 2, 2014, the Parties exchanged reply briefs, setting forth their responses to the arguments made in the opening mediation statements. During the mediation, the Parties also made detailed presentations to Judge Phillips

regarding the merits of the Action. At the end of the mediation, the Parties' respective positions still remained too far apart to resolve the Action.

68. For numerous months after the May 2014 mediation, the Parties continued their settlement discussions through scheduled telephonic conferences. These settlement discussions were initially facilitated by Judge Phillips and then continued directly between Lead Counsel and Defendants' Counsel. The discussions focused on the merits of the litigation, the significant risks faced by the Parties, the changing legal landscape, and varying assessments of the damages suffered, if any, by the class. On December 2, 2014, the Parties finally reached an agreement-in-principle to settle the Action for $146,250,000. Thereafter, the Parties informed the Court that they had reached an agreement-in-principle to settle the Action, but were still negotiating the full terms of the Settlement.

69. Over the next three months, the Parties engaged in further negotiations over the specific terms of the Settlement and memorialized their final agreement in the Stipulation dated March 5, 2015 and related exhibits (*i.e.*, the proposed orders, Notice, Summary Notice and Proof of Claim). At the end of the process, Lead Plaintiffs filed their motion for preliminary approval of the Settlement and permission to send out notice of the Settlement to the Settlement Class. ECF Nos. 89-92. On March 25, 2015, the Court issued its order preliminarily approving the Settlement and scheduling the Final Approval Hearing for August 12, 2015. ECF No. 93.

B. Reasons for Settlement[7]

70. Based on their collective experience and close knowledge of the facts and applicable law, Lead Counsel—two law firms that are well versed in the prosecution of complex securities litigation—believe that the Settlement is in the best interest of the Settlement Class. Lead Plaintiffs, including Amalgamated Bank (a large and sophisticated institutional investor), also fully endorse and support the Settlement.[8] While Lead Plaintiffs and Lead Counsel strongly believe in the merits of their case, they also understand and have considered the substantial risks and costs of further litigation.

71. Moreover, the Settlement represents a substantial portion of the Settlement Class's potential damages as estimated by Lead Counsel and their loss causation and damages experts. Lead Plaintiffs' damages experts have calculated likely recoverable aggregate damages to be approximately $560 million. This damages estimate, however, assumes that a jury would accept the Settlement Class's damages theory as being correct and recoverable and does not take into account the many risks Lead Plaintiffs faced if the Action proceeded to trial (as detailed

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7 Lead Counsel respectfully refer the Court to the Memorandum of Law in Support of Lead Plaintiffs' Motion for Final Approval of Class Action Settlement and Approval of Plan of Allocation (the "Settlement Memorandum"), submitted herewith, for a full analysis of the facts and law supporting final approval of the Settlement. As set forth in the Settlement Memorandum, courts in the Fourth Circuit consider the factors set forth in *In re Jiffy Lube Securities Litigation*, 927 F.2d 155 (4th Cir. 1991), to determine whether a proposed settlement is fair, reasonable and adequate. *Id.* at 159 (In determining a settlement's "fairness," courts consider "(1) the posture of the case at the time settlement was proposed, (2) the extent of discovery that had been conducted, (3) the circumstances surrounding the negotiations, and (4) the experience of counsel in the area of securities class action litigation[,]" and in determining a settlement's "adequacy," courts consider "(1) the relative strength of the plaintiffs' case on the merits, (2) the existence of any difficulties of proof or strong defenses the plaintiffs are likely to encounter if the case goes to trial, (3) the anticipated duration and expenses of additional litigation, (4) the solvency of the defendants and the likelihood of recovery on a litigated judgment, and (5) the degree of opposition to the settlement.").

8 *See* Declarations of Amalgamated Bank Executive Vice President and General Counsel Deborah Silodor on behalf of Amalgamated Bank, Gerald and Carolyn Friesen and Craig Bacino, attached hereto as Exhibits 1 through 3.

below), including the risk of overcoming the various defenses Defendants would likely assert which could substantially reduce or eliminate the Settlement Class's damages altogether. Accordingly, this Settlement—representing approximately 26% of aggregate damages—is a substantial result for the Settlement Class. In addition, the Settlement represents the *only* financial recovery for Duke and former Progress investors, as neither the SEC nor any other regulatory agency has recovered compensation for shareholders due to Defendants' conduct.

1. Risk of Establishing the Securities Act Claims

72. Lead Plaintiffs faced considerable challenges in establishing the falsity of statements in the Merger Registration Statement and Prospectus Materials given the novel legal issues in the case. First, although Lead Plaintiffs maintain that the effective date of the Merger Registration Statement was July 2, 2012, as stated in the Merger Registration Statement itself, at the motion to dismiss or summary judgment stage the Court could determine that the effective date was actually July 7, 2011 for purposes of the § 11 claim. Indeed, had the Court ruled in Lead Plaintiffs' favor on this issue, Defendants indicated they would seek an interlocutory appeal before the Fourth Circuit. While a ruling in Defendants' favor would not necessarily have been fatal to Lead Plaintiffs' claims, it would have rendered Lead Plaintiffs' falsity arguments more vulnerable to attack, as the facts supporting falsity became stronger over time. Likewise, Lead Plaintiffs faced risks regarding the ultimate determination of the relevant date under § 12(a)(2) for evaluating the falsity of the statements in the Prospectus Materials, as there is no controlling Fourth Circuit law on the issue. Therefore, there remained the possibility that the Court (or Fourth Circuit) would agree with Defendants' interpretation that the statements in the Prospectus Materials should be evaluated for their falsity as of August 23, 2011, the date the shareholders approved the Merger. Again, while Lead Plaintiffs believe that the Complaint alleged adequate facts to support the falsity of the statements as of August 23, 2011, such a determination would

weaken Lead Plaintiffs' ability to show that Defendants' concerns regarding Johnson had risen to a material level before they made the allegedly false statements. Second, regardless of the appropriate dates for evaluating falsity, there was always the very real risk that the Court or a jury would ultimately conclude that the statements were not false or misleading at summary judgment or at trial—but were a matter of business judgment—and that a corporate board is not required to disclose its concerns or decisions regarding a CEO until a formal vote occurs. After all, this case did not concern an accounting restatement and Defendants never admitted that the facts about Duke's CEO position were materially false.

73. The Recommendation, Lead Plaintiffs believe, rightly concluded that it was premature to decide whether or not the Securities Act Defendants were statutory sellers, as such a determination required a factual assessment that is typically inappropriate at the pleadings stage. Nevertheless, the Court could have rejected Magistrate Judge Cayer's analysis and found that Lead Plaintiffs failed to adequately allege solicitation, thereby dismissing the § 12(a)(2) claims against the Individual Defendants. Even if the Court sustained the § 12(a)(2) claims, moreover, to establish that the Individual Defendants were statutory sellers, Lead Plaintiffs would ultimately have to show that the Individual Defendants either (1) passed title to Lead Plaintiffs or (2) successfully solicited a purchase of Duke securities. Given that Defendants did not pass title to Lead Plaintiffs, Defendants aggressively argued that, as matter of law, the Individual Defendants did not solicit a purchase because they merely signed the Merger Registration Statement. Thus, Lead Plaintiffs risked that the Court or jury would conclude that the evidence did not support the conclusion that Defendants had solicited the purchase of Duke securities. These were only some of the risks Lead Plaintiffs faced moving forward in the litigation had a resolution not been reached.

2. Risk of Establishing a Duty to Disclose, Correct or Update

74. One of the central contested issues in this case was the determination of when Defendants had a duty to disclose their deliberations or decision to remove Johnson as Duke's CEO. While Magistrate Judge Cayer concluded that Defendants should have disclosed the decision about Johnson's removal because the information was material to investors, Lead Plaintiffs still faced several challenges in establishing that duty. First, Defendants repeatedly argued that, because no Board vote had yet taken place, no "decision" had been made and mere concerns regarding Johnson or even discussions or deliberations regarding his removal did not rise to a level of materiality that mandated disclosure. Moreover, the duty to disclose largely rested on the determination that the information was material to investors—which is a highly fact intensive inquiry. Accordingly, after full discovery, the Court or a jury could have concluded the Defendants did not have a duty to disclose their internal deliberations prior to a formal Board vote to remove Johnson. Particularly if a jury assigned substantial weight to the Board's actual vote—as Defendants and their experts were sure to argue—Lead Plaintiffs ran the risk of no recovery whatsoever.

3. Risk of Establishing Scienter

75. Establishing scienter also presented risks for purposes of Lead Plaintiffs' § 10(b) claims. Throughout the Action, Defendants maintained that they kept the information regarding their concerns and deliberations regarding Johnson in confidence with a lawful intent of furthering Duke's competitive interests and the completion of a beneficial merger. Essentially, Defendants argued that they acted in good faith, pointing to the fact that they actually retained counsel to ensure that they took legally appropriate actions and were not required to disclose the omitted facts. Thus, Lead Plaintiffs faced the challenge that, at trial, a jury would conclude that Defendants did not act with the intent to deceive, but instead acted consistently with their

fiduciary obligations to Duke's shareholders and their contractual obligations under the Merger Agreement. Indeed, Defendants were certain to point to Duke's performance after the Merger and argue that the Board's decision actually benefitted shareholders.

4. Risk of Establishing Reliance

76. While the Supreme Court—in deciding *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014)—did not overturn the fraud-on-the-market presumption recognized in *Basic v. Levinson*, 485 U.S. 224, 108 S. Ct. 978 (1988), it held that Defendants may rebut the presumption of reliance under the fraud-on-the-market theory by showing that the false or misleading statements did not "impact" the price of the company's stock. Thus, Lead Plaintiffs faced the risk that, at the class certification stage, Defendants would succeed in demonstrating a lack of price impact and thus undermine Lead Plaintiffs' ability to satisfy the predominance requirement of Rule 23(b)(3). The risk was heightened here because the Exchange Act Defendants' statements were alleged to be false because they omitted material information. Accordingly, Duke's stock price did not move at the time the alleged false statements were made. Although Lead Plaintiffs believed they could establish price impact by *inter alia*, analyzing the corrective disclosures revealing the truth regarding Johnson's ouster, any successful price impact challenge would threaten Lead Plaintiffs' ability to establish direct or indirect reliance on defendants' alleged misrepresentations under § 10(b).

5. Risk of Establishing Loss Causation and Damages

77. Lead Plaintiffs also faced considerable hurdles with regards to proving loss causation. Defendants aggressively challenged Lead Plaintiffs' loss causation theory, arguing that the drops in the price of Duke's common stock were unrelated to any revelation of alleged misstatements. Particularly with regard to the stock price declines after July 3, 2012, Defendants argued, and would have experts opine, that they could not have been related to the alleged fraud

because the news regarding Johnson's removal was already known. While Lead Plaintiffs argued that Johnson's resignation was merely a partial disclosure and that the subsequent corrective disclosures revealed new, additional facts regarding the truth surrounding Johnson's ouster, Defendants were certain to challenge the materiality of those facts and whether they were a "substantial cause" of the subsequent stock price declines alleged in the Complaint. Thus, there existed a possibility that Lead Plaintiffs would be unable to recover the losses from the stock price declines between July 3, 2012 and July 9, 2012, which would have considerably reduced the recoverable damages in this Action.

78. Even if a jury found that the disclosures were a substantial factor in causing the stock price declines, Defendants would have argued that damages should be reduced as a result of other factors that impacted Duke's share price, such as market and industry factors regarding the price of oil or developments in the Middle East, or other Company-specific news or information. Moreover, defendants would have likely asserted a proportional fault defense to reduce or eliminate § 10(b) damages entirely by arguing that the Exchange Act Defendants relied on others, including counsel, in choosing not to disclose the facts regarding Johnson's termination.

79. Under any circumstances, the issues of loss causation and damages would likely come down to a battle of the experts. The Parties had already retained such experts and discussed their findings as part of the mediation process. Accordingly, Lead Plaintiffs and their counsel recognized that the Court and the jury would be presented with very different opinions from highly qualified experts. If the Court of the jury found Defendants' expert's testimony to be more plausible, it would be likely that Lead Plaintiffs and the Settlement Class would recover nothing at all.

C. Notice to the Settlement Class Meets the Requirements of Due Process and Rule 23 of the Federal Rules of Civil Procedure

80. Pursuant to its March 25, 2015 Preliminary Approval Order, the Court (a) directed that notice be disseminated to the Settlement Class; (b) set June 8, 2015 as the deadline for Settlement Class Members to request exclusion from the Settlement Class or to submit objections to the Settlement, the Plan of Allocation, and/or the Fee and Expense Application; and (c) set a final approval hearing date of August 12, 2015, at 9:30 a.m. ECF No. 93.

81. In accordance with the Preliminary Approval Order, Lead Counsel instructed Gilardi & Co. LLC ("Gilardi"), the Court-appointed Claims Administrator for the Settlement, to (1) mail copies of the Notice and Proof of Claim (together, the "Claim Package") by first-class mail, postage prepaid to all members of the Settlement Class who could be identified through reasonable effort, including as contained on the shareholder lists provided by Duke as set forth in the Stipulation; and (2) publish the Summary Notice in accordance with the Preliminary Approval Order (*i.e.*, in the national edition of *Investor's Business Daily* and over *PR Newswire*). The Claim Package contains, among other things, a description of the Settlement, information regarding the lawsuit, the Plan of Allocation, and the right of Settlement Class Members to: (a) participate in the Settlement;[9] (b) object to any aspect of the Settlement, the Plan of Allocation and/or the Fee and Expense Application; or (c) exclude themselves from the Settlement Class. The Claim Package also informs recipients of Lead Counsel's intent to apply to the Court for an award of attorneys' fees in an amount of 24.5% of the Settlement Fund and reimbursement of Litigation Expenses in an amount not to exceed $250,000, and Lead Plaintiffs' intent to apply to

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[9] Settlement Class Members who wish to be potentially eligible to receive a distribution from the Net Settlement Fund are required to submit a completed Proof of Claim, along with supporting documentation, to the Claims Administrator Gilardi postmarked no later than July 13, 2015.

the Court for reimbursement of their costs and expenses (including lost wages) incurred in connection with their representation of the Settlement Class, in an amount not to exceed $27,500 in the aggregate.

82. As set forth in the Declaration of Carole K. Sylvester Regarding Execution of Notice Plan attached hereto as Exhibit 4 (the "Sylvester Decl."), as of May 22, 2015, the Claims Administrator has disseminated a total of 440,953 Claim Package to potential members of the Settlement Class and nominees in accordance with the Preliminary Approval Order. *See* Sylvester Decl. at ¶ 10.[10] Moreover, pursuant to the Preliminary Approval Order, on April 16, 2015, the Claims Administrator caused the Summary Notice to be published in the national edition of *Investor's Business Daily* and transmitted over *PR Newswire*. *Id.* at ¶ 13.

83. Lead Counsel also caused the Claims Administrator to establish a website dedicated to the Settlement (*i.e.*, www.DukeSecuritiesSettlement.com). The website provides members of the Settlement Class and other interested Persons with information concerning the Settlement and access to downloadable copies of the Notice, Summary Notice and Proof of Claim, as well as a copy of the Stipulation, the Preliminary Approval Order, and the Complaint. *Id.* at ¶ 12.[11] Additionally, the Claims Administrator established and maintains a toll-free telephone number to respond to inquiries from Settlement Class Members regarding the Settlement and how to obtain and complete a Proof of Claim. *Id.* at ¶ 11.

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[10] To disseminate the Claim Packages, the Claims Administrator used shareholder data received from Duke and Duke's transfer agent regarding potential Settlement Class Members. *See* Sylvester Decl. at ¶ 3. The Claims Administrator also mailed copies of the Claim Package to the brokerages, custodial banks and other institutions ("Nominees") contained in a proprietary database, as well as the names and addresses for additional potential Settlement Class Members provided to the Claims Administrator by Nominees. *Id.* at ¶¶ 4-9.

[11] In addition, Lead Counsel also included on their websites the pertinent facts about the proposed Settlement, including copies of the Notice and Proof of Claim. *See* www.rgrdlaw.com/cases-duke-energy.html and www.ktmc.com/cases_settled.php.

84. As set forth above, the deadline for members of the Settlement Class to file objections to the Settlement, the Plan of Allocation, and/or the Fee and Expense Application is June 8, 2015. Following the dissemination of over 440,900 Claim Packages, as of May 22, 2015, not a single objection to any aspect of the Settlement has been received. In addition, just 54 requests for exclusion on behalf of potential Settlement Class Members who, to the extent this information was provided, collectively held less than 14,000 shares of Duke common stock during the Settlement Class Period—approximately .005% of the estimated number of damaged shares—have been submitted.[12]

D. The Plan of Allocation

85. Lead Plaintiffs have proposed a plan for allocating the proceeds of the Settlement among members of the Settlement Class who submit timely and valid Proofs of Claim to the Claims Administrator in connection with this Settlement. As set forth in Appendix A to the Notice, the objective of the "Proposed Plan of Allocation of the Net Settlement Fund" is to equitably distribute the net proceeds of the Settlement to those members of the Settlement Class who suffered economic losses as a result of the alleged violations of the federal securities laws asserted in the Action. Calculations under the Plan are generally based upon the measure of damages set forth in § 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder by the SEC.

86. The Plan was prepared in consultation with Lead Plaintiffs' loss causation and damages experts. Although the Plan is not a formal damages analysis, it reflects the experts' and Lead Counsel's analysis, including a review of public commentary regarding Duke, an event

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[12] Lead Counsel will address any objections and additional requests for exclusion received after the date of this submission, in Lead Plaintiffs' reply to be filed with the Court on July 29, 2015, as provided in the Preliminary Approval Order.

study and analysis of the price movements of Duke common stock and the price performance of relevant market and peer indices during the Settlement Class Period and modeling of the volume, timing and retention of Duke common stock purchases and acquisitions. The Plan also reflects the experts' and Lead Counsel's estimates of the stock price declines likely attributable to Defendants' alleged conduct and the risks in establishing loss causation and damages. Lead Counsel believe that the Plan is fair, reasonable and adequate to the Settlement Class.

87. Under the Plan, a "Recognized Loss Amount" will be calculated for each share of Duke common stock purchased or acquired during the Settlement Class Period (*i.e.*, the period from June 11, 2012 through July 9, 2012) that is listed in a claimant's Proof of Claim and for which adequate documentation is provided. A claimant's Recognized Loss Amount will depend upon several facts such as: (1) the amount of Duke common stock purchased and/or acquired during the Settlement Class Period; (2) the timing of such purchases and/or acquisitions of Duke common stock; and (3) the timing of sales, if any, of such Duke common stock.

88. For a Settlement Class Member to have compensable losses under the Plan, the disclosure of the allegedly misrepresented information must have been the cause of the decline in the price of Duke common stock at issue. In this Action, Lead Plaintiffs alleged that corrective information which removed the alleged artificial inflation from the stock price and affected the price of Duke common stock in a statistically significant manner was released: (i) prior to the market opening on July 3, 2012; (ii) during the market hours on July 6, 2012; and (iii) prior to the market opening on July 9, 2012. Accordingly, in order to have a compensable loss, a Settlement Class Member must have purchased or acquired Duke common stock during the Settlement Class Period and held such stock through at least one of the foregoing corrective disclosure dates.

89. In calculating a Settlement Class Member's Recognized Loss Amount, the Plan also takes into account the PSLRA's statutory limitation on recoverable damages, whereby losses on eligible Duke common stock cannot exceed the difference between the purchase price paid for the stock and the average price of the stock during the 90-day period subsequent to the Settlement Class Period if the share was held through October 5, 2012 (*i.e.*, the end of the 90-day period) and losses on eligible Duke common stock purchased or acquired during the Settlement Class Period and sold *during* the 90-day period subsequent to the Settlement Class Period cannot exceed the difference between the purchase price paid for the stock and the average closing price of the stock during the portion of the 90-day period elapsed as of the date of sale. *See* Sylvester Decl. Exhibit A at 9.

90. As further explained in the Plan, the sum of a claimant's Recognized Loss Amounts will be the claimant's Recognized Claim. The Net Settlement Fund will be allocated on a *pro rata* basis to Authorized Claimant's based on each Authorized Claimant's Recognized Claim in comparison to the total Recognized Claims of all Authorized Claimants.

91. The structure of the Plan is comparable to plans of allocation that have been used in numerous securities class actions. Lead Counsel submit that the Plan of Allocation is fair and reasonable and should be approved together with the Settlement. In addition, in response to the dissemination of over 440,900 copies of the Claim Package to potential Settlement Class Members and Nominees, there have been no objections to date to the proposed Plan of Allocation.

V. APPLICATION FOR ATTORNEYS' FEES AND LITIGATION EXPENSES

92. In addition to seeking final approval of the Settlement and Plan of Allocation, Lead Counsel are also making an application to the Court for an award of attorneys' fees and

Litigation Expenses incurred by Plaintiffs' Counsel[13] during the course of the Action, and for reimbursement of costs and expenses to Lead Plaintiff Amalgamated Bank in connection with its representation of the Settlement Class.[14] Specifically, Lead Counsel are applying for attorneys' fees in the amount of 24.5% of the Settlement Fund and for Litigation Expenses in the total amount of $191,738.27, plus interest earned on these amounts at the same rate as the Settlement Fund. Lead Counsel also respectfully request reimbursement in the amount of $20,612.50 in costs and expenses incurred by Lead Plaintiff Amalgamated Bank directly related to its representation of the Settlement Class pursuant to 15 U.S.C. § 77z-1(a)(4) and 15 U.S.C. § 78u-4(a)(4).

93. Lead Counsel are submitting their Fee and Expense Application with the prior approval of Lead Plaintiffs and this application is made in accordance with the retainer agreements entered into by Lead Plaintiffs and Lead Counsel. Under these retainer agreements, Lead Counsel agreed to prosecute the litigation on an entirely contingent basis, meaning that Lead Counsel would not be compensated at all, or reimbursed for any expenses incurred on behalf of the Settlement Class, unless it obtained a recovery for the Settlement Class.

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[13] Plaintiffs' Counsel refers collectively to Lead Counsel, Kessler Topaz and Robbins Geller, Liaison Counsel Blue Stephens & Fellers LLP and additional local counsel McDaniel & Anderson, L.L.P. The lodestar and expense submissions of Eli R. Greenstein (the "Greenstein Decl."), Tor Gronborg (the "Gronborg" Decl."), Dhamian A. Blue (the "Blue Decl.") and L. Bruce McDaniel (the "McDaniel Decl."), on behalf of Kessler Topaz, Robbins Geller, Blue Stephens & Fellers LLP and McDaniel & Anderson, L.L.P., respectively, are attached as Exhibits 5 through 8 hereto. These declarations set forth the names of the attorneys and professional support staff who worked on the Action, the hourly rates currently chargeable by each such attorney and professional support staff, the lodestar value of the time expended by such attorneys and professional support staff, the unreimbursed expenses of the firms, and the background and experience of the firms.

[14] As set forth in the Stipulation, approval of Lead Counsel's Fee and Expense Application is independent from the approval of the Settlement. Any determination with respect to Lead Counsel's Fee and Expense Application will not affect the Settlement, if approved.

94. Consistent with Lead Plaintiffs' endorsement, the Notice informed Settlement Class Members of Lead Counsel's intent to apply for an award of attorneys' fees in an amount of 24.5% of the Settlement Fund and Litigation Expenses in an amount not to exceed $250,000.

A. The Attorneys' Fees Requested are Fair and Reasonable

95. In the Fourth Circuit, there exists a clear preference for awarding attorneys' fees based on the percentage-of-recovery method.[15] Moreover, as detailed in the accompanying Fee Memorandum, Lead Counsel's request for attorneys' fees in the amount of 24.5% of the Settlement Fund is consistent with established precedent in this District and throughout the Fourth Circuit, as well as in federal courts throughout the country, as fees equal (and greater) to the requested percentage have been consistently awarded in securities class actions to plaintiffs' counsel working on a contingent fee basis and obtaining a common fund for the benefit of a class.

96. In determining whether a fee request is reasonable, courts in the Fourth Circuit also consider certain additional factors in their analysis. *See, e.g.*, *Mills*, 265 F.R.D. at 261 (applying seven-factor approach derived from the Third Circuit in *In re Cendant Corp. Litigation*, 264 F.3d 201, 220, 282-83 (3d Cir. 2001)); *Jones*, 601 F. Supp. 2d at 760; *Muhammad v. Nat'l City Mortg., Inc.*, Civil Action No. 2:07-0423, 2008 U.S. Dist. LEXIS 103534, at *21-22 (S.D. W.Va. Dec. 19, 2008). The relevant factors to be considered include: (i) the results obtained; (ii) objections to the settlement terms and/or fees requested by counsel; (iii) the quality, skill, and efficiency of the attorneys involved; (iv) the complexity and duration of the litigation; (v) the risk of nonpayment; (vi) public policy; and (vii) awards in similar cases.

15 *See e.g.*, *Jones v. Dominion Res. Servs.*, 601 F. Supp. 2d 756, 758 (S.D. W.Va. 2009) ("The percentage method has overwhelmingly become the preferred method for calculating attorneys' fees in common fund cases").

Mills, 265 F.R.D. at 261.[16] Lead Counsel respectfully submit that an analysis of these criteria demonstrates that the requested fee is fair and reasonable. Below is a summary of the primary factual bases for Lead Counsel's request for attorneys' fees. The legal authority supporting this request is set forth in the Fee Memorandum submitted herewith.

1. The Time and Labor Devoted to the Action by Plaintiffs' Counsel

97. Plaintiffs' Counsel have devoted substantial time and effort to investigating and prosecuting this case and arriving at the present Settlement in the face of substantial risks. As detailed above in ¶¶ 18-69, Plaintiffs' Counsel, among other efforts, conducted an extensive investigation into the Settlement Class's claims, including review and analysis of tens of thousands of pages of documentary material, informal discovery and regulatory filings; researched and prepared a detailed 338-paragraph complaint incorporating the fruits of Lead Counsel's investigation; prepared comprehensive legal memoranda and briefing in opposition to Defendants' motion to dismiss and a subsequent objection to Judge Cayer's Recommendation; consulted with loss causation and damages experts in developing allegations and damages theories in the case; conducted informal discovery and engaged in hard-fought and protracted settlement negotiations with experienced defense counsel. *See* Fee Memorandum, §II.B.4. At all times during the pendency of the Action, Lead Plaintiffs' efforts were driven and focused on

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[16] Some courts in the Fourth Circuit also elect to apply all or some of the factors that the Fifth Circuit announced in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), which the Fourth Circuit relied upon in *Barber v. Kimbrell's*, 577 F.2d 216, 226 n.28 (4th Cir. 1978). In *Barber*, the Fourth Circuit adopted the twelve factors first laid out by the Fifth Circuit in *Johnson* to determine whether requested attorneys' fees are reasonable. *Id*. The *Johnson* factors include: (1) time and labor required; (2) novelty or difficulty of the issues; (3) skill required to perform the legal services properly; (4) preclusion of other employment; (5) customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) amount involved and results obtained; (9) the experience, reputation and abilities of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship [with the client]; and (12) awards in similar cases. *Johnson*, 488 F.2d at 717-19; *Barber*, 577 F.2d at 226 n.28.

advancing the litigation to bring about the most successful outcome for the Settlement Class, whether through settlement or continued litigation towards trial.

98. We, along with other partners at our firms, maintained daily control and monitoring of the work that each attorney at the firm performed on this case. Experienced attorneys at the firm undertook particular tasks appropriate to their levels of expertise, skill and experience, and more junior attorneys and paralegals worked on matters appropriate to their experience levels. Throughout the prosecution of the claims against defendants, work assignments were allocated among the attorneys at our firms in order to avoid unnecessary duplication of effort.

99. As set forth in Exhibits 5 through 8 hereto, Plaintiffs' Counsel have expended over 6,900 hours since the inception of this case to the investigation, prosecution and resolution of the claims against Defendants for an aggregate lodestar value of $4,091,730.25.[17]

2. Quality of Lead Counsel's Representation and the Result Obtained for the Settlement Class

100. The expertise and experience of counsel are important factors in setting a fair fee. As Lead Counsel's firm resumes (*see* Exhibit 3 to the Greenstein Declaration and Exhibit C to the Gronborg Declaration) demonstrate, the attorneys at Kessler Topaz and Robbins Geller are experienced and skilled class action securities litigators and have a successful track record in securities cases throughout the country—including within this Circuit. Liaison Counsel, Blue Stephens & Fellers LLP, is also highly experienced in complex litigation (*see* Exhibit C to the Blue Declaration).

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[17] Each of the declarations submitted on behalf of Plaintiffs' Counsel contains a fee schedule indicating the amount of time spent by each attorney and paraprofessional employed by Plaintiffs' Counsel, and the lodestar calculations based on their current billing rates. As set forth in each declaration, the declarations were prepared from contemporaneous daily time records regularly prepared and maintained by the respective firms.

101. Through their efforts detailed herein, Lead Counsel secured a $146,250,000 Settlement for the benefit of the Settlement Class. Lead Counsel respectfully submit that this Settlement—representing approximately 26% of the Settlement Class's recoverable damages as estimated by Lead Plaintiffs' damages expert—is an outstanding result for the Settlement Class. Additionally, the Settlement, if approved, will rank among the top five recoveries in a securities class action in the Fourth Circuit and the largest ever in North Carolina. Indeed, the result achieved for the Settlement Class reflects the superior quality of Lead Counsel's representation.

3. Standing and Caliber of Opposing Counsel

102. The quality of Lead Counsel's work in achieving the Settlement should also be evaluated in light of the quality of opposing counsel. Here, Sidley Austin LLP and Womble Carlyle Sandridge & Rice, LLP spared no effort or expense in defending their clients. Nonetheless, in the face of this formidable opposition, Lead Counsel were able to develop a case—after extensive investigation and contentious briefing on the Motion to Dismiss—that was sufficiently strong to persuade Defendants to settle on terms that are favorable to the Settlement Class.

4. Risks of Litigation and the Need to Ensure the Availability of Competent Counsel in High-Risk, Contingent Securities Cases

103. This Action was initiated, and continued against Defendants, on an entirely contingent basis. Not only did this case involve a unique set of facts, but it also involved novel legal issues undecided under Fourth Circuit law. Moreover, given the risks described above (*see* ¶¶70-79) and in the memoranda submitted herewith, the outcome against Defendants was far from certain. Indeed, at the time the Parties reached the Settlement, Defendants' Motion to Dismiss was pending before the Court.

104. From the outset, Lead Counsel and Lead Plaintiffs appreciated the significant risks inherent in all securities litigation, including overcoming motions to dismiss, generating a compelling factual record through discovery, obtaining class certification, surviving summary judgment, and prevailing at trial and on any post-trial appeals. Here, Lead Plaintiffs faced significant risks to establishing their case against Defendants, especially proving falsity, Defendants' scienter, materiality, a legal duty to disclose, and loss causation. Lead Plaintiffs also faced hurdles associated with a potential proportional fault defense, which would attempt to shift blame onto third parties, and could have the effect of reducing or eliminating the Settlement Class's damages entirely. Lead Counsel and Lead Plaintiffs agreed to settle this Action on the terms of the Stipulation based on their careful investigation and evaluation of the facts and law relating to the allegations in the Complaint, as well as their evaluation of the significant risks if the Action continued.

105. Throughout the Action, Lead Counsel assured that sufficient attorney resources were dedicated to prosecuting the claims against Defendants, and that sufficient funds were available to advance the expenses required to pursue and complete such complex litigation. In total, Plaintiffs' Counsel have incurred $191,738.27 in unreimbursed expenses in investigating, prosecuting, and resolving this Action for the benefit of the Settlement Class.

106. On many occasions, plaintiffs' counsel in contingency-fee cases such as this have worked thousands of hours, only to receive no compensation. Lead Counsel is fully aware—from personal experience—that despite the most vigorous and competent of efforts, a law firm's success in contingent litigation such as this is never guaranteed. Moreover, Lead Counsel know that many capable plaintiffs' firms have suffered major defeats after years of litigation, and after

expending tens of millions of dollars of time, without receiving any compensation for their efforts.

5. Reaction of the Settlement Class to the Fee Application to Date

107. As set forth above, more than 440,900 Claim Packages have been mailed to potential members of the Settlement Class and Nominees. *See* Sylvester Decl. at ¶ 10. In addition, the Summary Notice was published in the national edition of *Investor's Business Daily* and transmitted over *PR Newswire*. *Id.* at ¶ 13. All important documents related to the Settlement, including the Stipulation, have been posted on the website for this Action, www.DukeSecuritiesSettlement.com, for review. *Id.* at ¶ 12. The Notice explains the Settlement and Lead Counsel's fee request. The deadline to object to Lead Counsel's fee request is June 8, 2015. To date, not one objection to Lead Counsel's fee request has been received. Moreover, as set forth above, Lead Counsel's Fee and Expense Application is fully supported by Lead Plaintiffs.

108. In sum, given the complexity and uncertainty of the claims against Defendants; the efforts undertaken by Lead Counsel on behalf of the Settlement Class; the risks Lead Plaintiffs faced in connection with proving falsity, scienter, loss causation, and damages; the experience of Lead Counsel and Settling Defendants' Counsel; and the contingent nature of Lead Counsel's agreement to prosecute the claims against Defendants, Lead Counsel respectfully submit that the requested attorneys' fees are reasonable and should be approved.

B. The Expenses Requested Are Fair and Reasonable

109. Lead Counsel also request payment from the Settlement Fund in the amount of $191,738.27 for Litigation Expenses that were reasonably and necessarily incurred by Plaintiffs' Counsel in connection with commencing, prosecuting, and resolving the claims asserted in the Action against Defendants, with interest thereon, as well as $20,612.50 for the costs and

expenses incurred by Settlement Class Representative Amalgamated Bank directly related to its representation of the Settlement Class.

110. Lead Counsel respectfully submit that the request for payment of expenses is appropriate, fair, and reasonable and should be approved in the amounts submitted herein. Lead Counsel were aware that they might not recover any of the expenses incurred in prosecuting the claims against Defendants, and, at a minimum, would not recover them until the claims were successfully resolved. Lead Counsel also understood that, even assuming the case was ultimately successful, an award of expenses would not compensate them for the lost use of funds advanced to prosecute the claims against Defendants. Thus, Lead Counsel were motivated to, and did, take significant steps to minimize expenses whenever practicable without jeopardizing the vigorous and efficient prosecution of the claims against Defendants.

111. The expenses incurred by Plaintiffs' Counsel were necessary and appropriate for the prosecution of the claims against Defendants. These expenses include charges for Lead Plaintiffs' loss causation and damages experts, legal research devoted to the case, costs incurred for out-of-town travel, charges for document reproduction, telephone, postal and express mail charges, and similar case-related costs. Courts have typically found that such expenses are paid from a fund recovered by counsel for the benefit of the class.

112. Included in the amount of expenses is $60,553.52 paid to Lead Plaintiffs' experts, consultants and outside investigators. This encompasses approximately 32% of Plaintiffs' Counsel's total expenses. A large portion of this amount was paid to Lead Plaintiffs' loss causation and damages expert, Chad W. Coffman of Global Economics Group, LLC. As detailed above, Mr. Coffman was retained by Lead Plaintiffs to perform a damages analysis under §§ 11 and 12(a)(2) of the Securities Act as well as a loss causation and damages analysis

under § 10(b) of the Exchange Act and Rule 10b-5. *See supra* ¶¶ 59-60. Further, Lead Counsel utilized Mr. Coffman's damages and loss causation analysis during mediation and in developing the proposed Plan of Allocation.

113. In addition, Lead Counsel paid $28,375.00, or approximately 15% of Plaintiffs' Counsel's total expenses, for mediation fees assessed by the mediator in this matter, the Honorable Layn Phillips (Ret.). Lead Counsel was also required to travel in connection with the formal mediation with Judge Phillips on May 14, 2015 in New York City and the prior informal mediation with counsel on March 12, 2105 in Charlotte, North Carolina and thus incurred the related costs of airline tickets, meals and lodging. Included in Plaintiffs' Counsel's total expenses is $26,495.81 for such travel expenses necessarily incurred by Lead Counsel for these and similar litigation-related purposes.

114. Plaintiffs' Counsel's expenses also include the costs of online legal and factual research related to the claims against Defendants. These are the charges for computerized factual and legal research services such as LexisNexis and Westlaw. It is now standard practice for attorneys to use LexisNexis and Westlaw to assist them in researching legal and factual issues, and, indeed, courts recognize that these tools create efficiencies in litigation and ultimately save money for clients and the class.

115. Additionally, pursuant to 15 U.S.C. § 77z-1(a)(4) and 15 U.S.C. § 78u-4(a)(4), Settlement Class Representative Amalgamated Bank seeks reimbursement of its reasonable costs and expenses incurred directly in connection with its representation of the Settlement Class in the amount of $20,612.50. The amount of time and effort devoted to this Action by Amalgamated Bank is detailed in the accompanying declaration of its representative, Deborah Silodor, attached hereto as Exhibit 1. Lead Counsel respectfully submit that the amount requested by

Amalgamated Bank is fully consistent with Congress's intent, as expressed in the PSLRA, of encouraging institutional and other highly experienced plaintiffs to take an active role in bringing and supervising actions of this type.

116. Likewise, additional Lead Plaintiffs Gerald Friesen, Carolyn Friesen and Craig Bacino have been fully committed to pursuing the Settlement Class's claims and have devoted time and effort to their representation of the Settlement Class. These efforts are detailed in the supporting declarations attached as Exhibits 2 and 3 hereto. These Lead Plaintiffs are not seeking reimbursement of costs and expenses.

117. The Notice informed potential Settlement Class Members that Lead Counsel would be seeking Litigation Expenses in an amount not to exceed $250,000 and that Lead Plaintiffs intended to apply to the Court for reimbursement of their costs and expenses in an amount not to exceed $27,500 in the aggregate. The present application for expenses is within the upper limits contained in the Notice. To date, not one objection to the maximum amount of expenses set forth in the Notice has been received.

118. The expenses incurred by Plaintiffs' Counsel were reasonable and necessary to pursue the interests of the Settlement Class and achieve the present Settlement. Accordingly, Lead Counsel respectfully submit that the expenses incurred by Plaintiffs' Counsel and Lead Plaintiff Amalgamated Bank are fair and reasonable and should be reimbursed in full from the Settlement Fund.

I hereby declare that the foregoing is true and correct.

Dated: May 22, 2015

ELI R. GREENSTEIN

Dated: May 22, 2015

TOR GRONBORG

CERTIFICATE OF SERVICE

I hereby certify that on May 22, 2015, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on May 22, 2015.

/s/ Eli R. Greenstein
Eli R. Greenstein

Mailing Information for a Case 3:12-cv-00456-MOC-DSC

Electronic Mail Notice List

The following are those who are currently on the list to receive e-mail notices for this case.

- **Steven M. Bierman**
  sbierman@sidley.com,emalin@sidley.com
- **Dhamian A. Blue**
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